IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ELIZABETH KUPCHINSKI	)	
	)	CRIMINAL ID NUMBER
Appellant	)	
v.	)	0806037733
	)	
STATE OF DELAWARE	)	
	)	
	)	
Appellee	)	

Submitted: October 2, 2009
Decided: January 15, 2010

MEMORANDUM OPINION

Appeal from a Decision of
the Court of Common Pleas - ***AFFIRMED***

Appearances:

Gerard M. Spadaccini, Esquire, Wilmington, Delaware, attorney for appellant

Kate S. Keller, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, attorney for appellee

HERLIHY, Judge

Elizabeth Kupchinski appeals her harassment conviction in the Court of Common Pleas. She claims that the State did not produce enough evidence for a rational trier of fact to conclude that Elizabeth Kupchinski knew that her actions would cause the victim, Ann Flowers, to respond violently or disorderly, or that her actions would cause Flowers substantial emotional distress. This Court finds there was sufficient evidence viewed in a light most favorable to the State for a rationale trier of fact to have found Kupchinski guilty beyond a reasonable doubt.

Factual Background

On June 24, 2008, Ann Flowers[1] was standing in her driveway in Bear when a car stopped at her driveway and someone shouted "Bitch. I'm going to get you." Ann identified the person yelling at her as the appellant, Elizabeth Kupchinski. Elizabeth was then arrested and charged by information with harassment.[2] She waived her right to a jury and a bench trial in the Court of Common Pleas was commenced on April 13, 2009.

The State first called Ann. She stated that she was in her driveway retrieving the mail when she observed a car stop out front of her house and Elizabeth yelled at her. The mailbox is located at the end of the driveway by the street. Ann thought Elizabeth's sister was driving the car with her as a passenger. When Ann was asked how the statements

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[1] Due to two witnesses each sharing the last names "Kupchinski" and "Flowers" the Court will refer to the witnesses by their first names.

[2] 13 *Del. C.* § 1311(a)(1).

made her feel she responded, "She stopped the car and I literally thought that they were going to get out and get me until they both noticed that my husband was at the end of the driveway behind a pole, before they took off."[3] Ann testified that she knew Elizabeth because her mother lives on her block and she immediately recognized her when she approached and that she had problems with her and her family in the past.[4]

The State then called Ann's husband, Garry Flowers. On the date in question he was out tending to his lawn when he saw an Oldsmobile with Maryland tags pull up and he heard someone shout, "I'm going to get you bitch." Although he was not able to identify who made the statement, he knew that it came from one of the two occupants in the Oldsmobile. Once Garry heard the shout he came out into the open from behind the truck. He believes that the Oldsmobile drove away when they saw him. After Garry testified, the State rested.

Elizabeth then called her daughter, Nichole Kupchinski. Nichole testified that she was driving with her mother on June 24, 2008, and that she slowed down after she heard Ann shout "Bitch" toward the car. Nichole testified that she shouted, "Bitch" in response. After she shouted, her mother stated, "Nichole, that's Miss Flowers, that's the one that got me in trouble before. Keep driving."[5] That prompted Nichole to drive away. On

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[3] Record at 5.

[4] Record at 4.

[5] Record at 23.

cross-examination, she testified that Elizabeth and Ann have had problems in the past when Flowers threatened Nichole's grandmother (Elizabeth's mother). Nichole testified that the 1980 Oldsmobile she was driving was always registered Delaware with Delaware tags.

Appellant, Elizabeth Kupchinski, then testified in her own defense. She testified that she and her daughter were driving her daughter's 1988 Delta Oldsmobile when they stopped in front of Ann's home. Elizabeth testified to the same exchange of words that Nichole detailed. She stated that Ann initiated the exchange. Elizabeth described her criminal history as "extensive," she was convicted of twelve crimes of dishonesty in the ten years prior to the trial.[6]

The court convicted Elizabeth of harassment. It sentenced her to three months of Level V suspended for eighteen months at Level II followed by six months at Level I. Elizabeth filed a motion for judgment of acquittal, which was withdrawn when she filed this appeal.

Parties' Contentions

Elizabeth argues that the State did not produce evidence that the spoken words were likely to produce a violent or disorderly response. Further, Appellant argues that there was insufficient evidence to prove that her actions were likely to cause substantial emotional distress. She argues that substantial emotional distress is some level of stress

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[6] Record at 35.

greater than what is expected in every day life and no rationale trier of fact could conclude that her words were likely to cause that level of stress.

The State responds by arguing it met its burden. It highlights trial testimony that it purports to show Elizabeth's intent to harass, annoy or alarm Ann. It argues that there was evidence established that the Kupchinksi family and Ann have had problems in the past and the evidence is sufficient to show she acted in a matter likely to provoke a violent or disorderly response or substantial emotional distress.

Standard of Review

The Superior Court sits as an appellate court for criminal trials in the Court of Common Pleas.[7] The role of the Court mimics that of the Supreme Court's appellate review.[8] It is to correct errors of law and to review the factual finding of the court below to determine if they are sufficiently supported by the records and are the product of an order and logical deductive process.[9] "If there is sufficient evidence to support the findings of the Trial Judge, the Superior Court, sitting in its appellate capacity must affirm, unless the findings are clearly wrong."[10] To determine sufficient evidence the Court must determine whether, after viewing the evidence in the light most favorable to the State, any

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[7] 11 *Del. C.* § 5301; DEL. CONST. Art. IV, § 28.

[8] *Shipkowski v. State*, 1989 WL 89667, at *1 (Del. Super. Jul. 28, 1989).

[9] *Guest v. State*, 2009 WL 2854670, at *1 (Del. Super. Sept. 4, 2009).

[10] *Ochoa v. State*, 2009 WL 2365651, at *2 (Del. Super. Jul. 31, 2009).

rationale trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[11] The Court does not make its own factual conclusions, weigh evidence or make credibility determinations.[12]

Discussion

Elizabeth was convicted of harassment in violation of 11 *Del. C.* § 1311(a)(1). Section 1311 was amended effective October 14, 2008.[13] The crime occurred on June 24, 2008; therefore, the State properly charged Elizabeth under the prior version of the statute. It read:

> (a) A person is guilty of harassment when, with intent to harass, annoy or alarm another person:
>
> (1) That person insults, taunts or challenges another person or engages in any other course of alarming or distressing conduct which serves no legitimate purpose and is in a manner which the person knows is likely to provoke a violent or disorderly response or cause a reasonable person to suffer substantial emotional distress.

It can be inferred from the court's conviction that it credited Ann's testimony and not give weight to Nichole and Elizabeth's description of the event. Also, it must have found that Elizabeth was the one who yelled at Ann. Mindful of this Court's limited

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[11] *McKinney v. State*, 2008 WL 282285, at *2 (Del. Super. Jan. 31, 2008).

[12] *State v. Goodwin*, 2007 WL 2122142 (Del. Super. Jul. 24, 2007).

[13] *See* 76 Del. Laws c. 34 § 6.

function when it sits as an appellate court, those factual findings and credibility determinations will not be disrupted as they are based in the evidence presented.

Elizabeth is disputing that the State' did not establish Elizabeth's required knowledge. The court could legally convict Elizabeth if it found her conduct was 1) likely to provoke a violent or disorderly response, *or* 2) likely to cause a reasonable person to suffer substantial emotional distress. Elizabeth argues, in summary fashion, that this Court should not consider the likelihood of a violent or disorderly response because the words spoken "did not even elicit a verbal response from her."[14] Her argument is misguided. The court does not consider the victim's response when determining whether it will cause a violent or disorderly response. The court should determine the likely effect of the defendant's words or conduct.

The court in *State v. Russel*[15] acquitted a defendant of harassment, finding that the State failed to prove the knowledge element. It held, "A reasonable person would not have the direct tendency to react to this conduct by an act of violence or a breach of the peace."[16] Therefore, this Court will affirm the conviction if it finds, when considering the evidence in the light most favorable to the State, that a rationale trier of fact could find that

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[14] Appellant's Br. at 5.

[15] 2007 WL 5006533 (Del. Comm. Pl. Dec. 3, 2007).

[16] *Id*. at *2.

Elizabeth's conduct would likely provoke Ann to react to it by an act of violence or a breach of the peace beyond a reasonable doubt.

The issue raised in this case is analogous to that considered in *Weber v. State*.[17] The statute at issue there was offensive touching which has similar elements to harassment. The Court's discussion, nevertheless, is helpful to the disposition of this case, especially the focus on the defendant's intent:

> We conclude, however, that a conviction for Offensive Touching does not require proof that the victim actually felt offended or alarmed. In relevant part, 11 *Del. C.* § 601 defines Offensive Touching as a person intentionally "touch[ing] another person either with a member of his or her body or with any instrument . . . knowing that the person is thereby likely to cause offense or alarm to such other person." This definition focuses on the actor's intent and knowledge before touching another person, not on that other person's resultant mental state.[18]

Evidence was presented at trial that Elizabeth and Ann knew each other and have had problems in the past. Nichole testified that Ann threatened to assault her grandmother (Elizbeth's mother). Ann testified that she immediately recognized Elizabeth because of their prior contacts. When considering the evidence in the light most favorable to the State, a rationale finder of fact can conclude that, given their confrontational past, when Elizabeth stated, "I'm going to get you bitch" that Ann would have the natural tendency

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[17] 971 A.2d 135 (Del. 2009).

[18] *Id.* at 142.

to react with violence or a breach of the peace. The fact that she did not react in such a fashion is not dispositive.

Section 1311(a)(1) uses the disjunctive "or." The State needed only to prove that Appellant's conduct was likely to cause a violent or disorderly response *or* substantial emotional distress. Given the findings above, the argument that the State did not prove substantial emotional distress is moot. The lower court's verdict was the product of an orderly and logical deductive process and is **AFFIRMED**.

IT IS SO ORDERED.

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J.